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No. PD-0867-18
Court of Appeals No. 04-17-00187-CR
Trial Court No. CR16-153

IN THE COURT OF

CRIMINAL APPEALS

AUSTIN, TEXAS

TROY ALLEN TIMMINS,
Appellant,

vs.

STATE OF TEXAS,
Appellee.

FROM THE FOURTH COURT OF APPEALS, SAN ANTONIO, TEXAS & 198TH JUDICIAL DISTRICT COURT, BANDERA COUNTY, TEXAS

APPELLANT'S BRIEF ON THE MERITS

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ORAL ARGUMENT REQUESTED

TABLE OF CONTENTS

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IDENTITY OF PARTIES & COUNSEL

Appellant certifies that the following is a complete list of the parties, attorneys, and any other person who has any interest in the outcome of this appeal:

Appellant:	Troy Allen Timmins
Appellee:	The State of Texas
Attorneys for Appellant:	M. Patrick Maguire M. Patrick Maguire, P.C. 945 Barnett Street Kerrville, Texas 78028 Ryan Kellus Turner 4602 Arapahoe Trail Austin, Texas 78745

Attorneys for Appellee:	Hon. Scott Monroe 198th Judicial District Attorney 400 Clearwater Paseo, Suite 500 Kerrville, Texas 78028 Hon. David A. Schulman Attorney at Law 1801 East 51st Street, Suite 365-474 Austin, Texas 78723
Trial Judge:	Hon. Rex Emerson 198th Judicial District Judge 700 Main Street Kerrville, Texas 78028
Court of Appeals:	Fourth Court of Appeals Cadena-Reeves Justice Center 300 Dolorosa, Suite 3200 San Antonio, Texas 78205-3037

INDEX OF AUTHORITIES

CASES

STATUTES AND RULES

STATEMENT REGARDING ORAL ARGUMENT

Appellant submits that oral argument would be helpful to the Court because there is no clear statutory guidance or case precedent regarding the issues raised in Appellant's Brief on the Merits. Additionally, the issues raised in Appellant's Brief on the Merits are issues of first impression.

STATEMENT OF THE CASE

Appellant, Troy Allen Timmins, is appealing his conviction for the felony offense of bail jumping/failure to appear. CR, 90. Appellant was convicted of this offense by a jury on March 22, 2017. CR, 77. Appellant's offense was enhanced to a second degree felony. CR, 77. The jury sentenced Appellant to 20 years in the Texas Department of Criminal Justice – Institutional Division on March 22, 2017. CR, 77. Appellant timely filed his Notice of Appeal. CR, 104. Appellant appealed the trial court's decision to the Fourth Court of Appeals. Oral argument was granted. On July 18, 2018, the Fourth Court of Appeals affirmed the trial court's judgment in a published opinion authored by Justice Chapa. *Appendix*.

The Court of Criminal Appeals granted Appellant's Petition for Discretionary Review on November 21, 2018. Appellant's Brief on the Merits is timely filed by being electronically filed with the Court of Criminal Appeals on January 7, 2019.

SUMMARY OF THE ARGUMENTS

I. The Fourth Court of Appeals erred in affirming Appellant's conviction for bail jumping/failure to appear because the evidence is legally insufficient to support Appellant's conviction. The term "appear" as used in the statute means to appear for a court proceeding. Appellant failed to report to jail as ordered by the trial court. Therefore, Appellant could not be convicted of bail jumping & failure to appear.

The Fourth Court of Appeals also erred in affirming Appellant's conviction because Appellant was not "released" from custody as required by the bail jumping/failure to appear statute. Appellant's bail was revoked by the trial court and the trial court ordered Appellant to report to jail later the same afternoon. Appellant remained under restraint pursuant to a lawful order of the trial court. Therefore, Appellant remained in custody. Because Appellant was not "released" from custody, the State failed to prove an essential element required to convict Appellant and the evidence is legally insufficient to support the conviction.

APPELLANT'S ISSUE PRESENTED FOR REVIEW

I. In an issue of first impression, did the court of appeals correctly determine that the evidence is legally sufficient to support a conviction for "bail jumping/failure to appear" when a trial court revokes a defendant's bail in open court, remands the defendant to jail, and the defendant fails to report to jail as ordered?

****** For purposes of reference in the Appellant's Brief on the Merits the following will be the style used in referring to the record:

1. Reference to any portion of the Court Reporter's Statement of Facts will be denoted as "(RR____, ____)," representing volume and page number, respectively.

2. The Transcript containing the District Clerk's recorded documents will be denoted as "(CR___, ___)."

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 9.4(i)(3) of the Texas Rules of Appellate Procedure, I certify that this brief contains 5,785 words (counting all parts of the document and relying upon the word count feature in the software used to draft this brief). The body text is in 14 point font and the footnote text is in 12 point font.

/s/ M. Patrick Maguire
M. Patrick Maguire,
Attorney for Appellant

ARGUMENTS & AUTHORITIES

I.
In an issue of first impression, did the court of appeals correctly determine that the evidence is legally sufficient to support a conviction for "bail jumping/failure to appear" when a trial court revokes a defendant's bail in open court, remands the defendant to jail, and the defendant fails to report to jail as ordered?

Statement of Facts

Trial Court

On September 19, 2016, Appellant appeared before the 198th Judicial District Court in Bandera County, Texas for a felony pretrial hearing. RR 6, 124. At the time of this court appearance, Appellant was free on bail. RR 6, 124. At the September 19th pretrial hearing, the trial judge revoked Appellant's bail because Appellant violated a bond condition by using illegal drugs. RR 6, 124. Appellant was remanded into custody and was ordered to report to the Bandera County Jail by 3 p.m. that same afternoon. RR 6, 124; RR 6, 147.

Appellant's mother had driven Appellant to court because Appellant could not drive. RR 6, 125-26. However, Appellant's mother did not know her way back to San Antonio from Bandera. RR 6, 125-26. After revoking Appellant's bail, the trial court permitted Appellant to accompany his mother back to San Antonio on the condition that he turn himself in to the Bandera County Jail by 3:00 p.m. that same day. RR 6, 126. The trial court

told Appellant that the court was ordering Appellant's "bond revoked, but I'm going to allow you to turn yourself in." RR 6, 130. The trial court stated, "okay, what I'm going to do is to order you to report to the Bandera County Jail on or before 3 p.m. today." RR 6, 130.

Appellant did not turn himself into jail on September 19, 2016 as ordered by the trial court. RR 6, 151. On September 23, 2016, Appellant was arrested in San Antonio. RR 6, 156-57.

Appellant was thereafter indicted, convicted by a jury, and sentenced for the felony offense of bail jumping/failure to appear under Texas Penal Code section 38.10. *Tex. Penal Code §38.10*.

Fourth Court of Appeals

On appeal, Appellant argued that the evidence was legally insufficient to support the trial court's judgment because the trial court's revocation of Appellant's bail bond meant that Appellant was in custody at the moment his bail was revoked; and the trial court's order that Appellant report to jail later that same afternoon was not a "release" as contemplated by the bail jumping/failure to appear statute, but was a furlough during which time Appellant remained in the constructive custody of the trial court. The import of this fact is that the applicable offense committed was the offense of escape, not bail jumping/failure to appear.

The term "appear" is not statutorily defined for purposes of the bail jumping/failure to appear statute. Relying upon the common usage of the term "appear" as it is defined in Black's Law Dictionary as well as how this term has been applied in Texas jurisprudence as relates to the offense of bail jumping/failure to appear, Appellant argued that the term "appear" as used in this statute means to appear for an official court proceeding, and that because reporting to jail is not an official court proceeding, the bail jumping/failure to appear statute does not apply. Appellant also relied upon a memorandum opinion from the Third Court of Appeals with analogous facts.

On July 18, 2018, the Fourth Court of Appeals issued a published opinion affirming the trial court's judgment. The Fourth Court noted, and Appellant agrees, that this is an issue of first impression. A true and correct copy of the Fourth Court's opinion is included in the attached *Appendix*.

Analysis

> ***The term "appear," for purposes of the failure to appear statute, means to appear for a court proceeding. In this case, Appellant failed to appear to jail, not a court proceeding, as ordered by the trial court.***

The bail jumping/failure to appear statute states that if "[a] person lawfully released from custody, with or without bail, on condition that he subsequently appear commits an offense if he intentionally or knowingly

fails to appear in accordance with the terms of his release." *Tex. Penal Code §38.10(a)*. "A person commits bail jumping and failure to appear if he is released from custody under the condition that he appear at a later *court proceeding* and intentionally or knowingly fails to do so as ordered." *In re B.P.C.*, 2004 Tex. App. LEXIS 4729, 4 (Tex. App.—Austin 2004, no pet.) (mem. op.) (emphasis added).

In evaluating the legal sufficiency of the evidence, the court considers the evidence in the light most favorable to the verdict and determines whether any rational trier of fact could have found the defendant guilty of all of the elements of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). To determine whether the State met its burden under *Jackson* to prove the defendant's guilt beyond a reasonable doubt, the court compares the elements of the crime as defined by the hypothetically correct jury charge to the evidence adduced at trial. *See Malik v. State*, 953 S.W.2d 234, 240 (Tex. Crim. App. 1997). A hypothetically correct jury charge "accurately sets out the law, is authorized by the indictment, does not unnecessarily increase the State's burden of proof or unnecessarily restrict the State's theories of liability, and adequately describes the particular offense for which the defendant was tried." *Id*. "[T]he 'law' as 'authorized by the indictment' must be the statutory

elements of the offense" and those elements as modified by the indictment. Curry v. State, 30 S.W.3d 394, 404 (Tex. Crim. App. 2000). "The hypothetically correct jury charge does not necessarily have to track exactly all of the charging instrument's allegations." Johnson v. State, 364 S.W.3d 292, 294 (Tex. Crim. App. 2012).

The indictment in Appellant's case alleges that Appellant "*did then and there, after being lawfully released from custody without bail on a pending felony charge on condition that he subsequently appear in the Bandera County Jail on or before 3:00 p.m., September 19, 2016, he intentionally or knowingly failed to appear in accordance with the terms of his release*." CR, 9. The indictment does not allege that Appellant failed to appear for a court proceeding. The jury charge does not contain a definition of "appear." CR, 64-65.

Each case identified by Appellant where a defendant was convicted of bail jumping/failure to appear involved a situation where a defendant failed to appear for a subsequent court proceeding. *See, e.g.,* Bailey v. State, 507 S.W.3d 740, 742 (Tex. Crim. App. 2016)(failure to appear at court setting); Bailey v. State, 469 S.W.3d 762, 766 (Tex. App.—Houston [1st Dist.] 2015), *aff'd*, 2016 Tex. Crim. App. LEXIS 1502 (Tex. Crim. App. 2016)(failure to appear for hearing); State v. Chinedu Godwin Ojiaku, 424 S.W.3d 633, 635

(Tex. App.—Dallas 2013, pet. ref'd)(failure to appear in trial court as ordered); *Carmichael v. State*, 416 S.W.3d 133, 135 (Tex. App.—Houston [1st Dist.] 2013, no pet.)(failure to appear in court); *Johnson v. State*, 416 S.W.3d 602, 603 (Tex. App.—Houston [14th Dist.] 2013, no pet.)(failure to appear in court); *Deleon v. State*, 411 S.W.3d 515, 516 (Tex. App.—Austin 2011, no pet.)(failure to appear at arraignment); *Kay v. State*, 340 S.W.3d 470, 470 (Tex. App.—Texarkana 2011, no pet.)(failure to appear at trial); *Reese v. State*, 305 S.W.3d 882, 883 (Tex. App.—Texarkana 2010, no pet.)(failure to appear at trial); *Walker v. State*, 291 S.W.3d 114, 116 (Tex. App.—Texarkana 2009, no pet.)(failure to appear at arraignment); *Winchester v. State*, 246 S.W.3d 386, 387 (Tex. App.—Amarillo 2008, pet. ref'd)(failure to appear at arraignment).

Appellant has not found any authority authorizing a conviction for this offense when a defendant has failed to report to jail. This is consistent with the logic expressed by the Austin Court of Appeals in *In re B.P.C.* In *B.P.C.*, the defendant (a juvenile) was charged with the offense of escape. *In re B.P.C.*, 2004 Tex. App. LEXIS 4729, 2 (Tex. App.—Austin 2004, no pet.) (mem. op.). The defendant had been placed on probation and later violated his probation terms. *Id*. The trial court ordered the defendant into confinement but released the defendant into his uncle's care under a

furlough order providing that defendant was to turn himself in at 7:00 p.m. that same day. *Id*. The defendant did not return as ordered. *Id*. The defendant was later apprehended by sheriff's deputies and charged with the offense of escape. *Id*. at 3.

On appeal, the defendant argued that he should have been charged with the commission of bail jumping/failure to appear instead of escape. *Id*. The Austin court disagreed, noting that "[t]he bail jumping statute would be a strange fit for this case, in which [the defendant] was released by the temporary furlough order for only a few hours to pick up some of his possessions." *Id*. at 4. The Austin court noted that the trial court's order stated that the defendant was to remain in the State's custody until he had successfully completed a court-ordered program, and his confinement was suspended only briefly, to be resumed as soon as the leave was over. *Id*. The Court reasoned that the defendant was not released and ordered to appear at a later proceeding as envisioned by the bail jumping/failure statute to appear. *Id*. In support of its decision, the Austin court cited the commentary to the bail jumping/failure to appear statute noting that the offense of bail jumping/failure to appear occurs "when a court appearance is missed." *Id*. at 5. The Austin court also quoted the *Black's Law Dictionary* definition of "appear" as "to be properly before a court . . . coming into court

by a party to a suit; 'appearance' defined as 'coming into court as party to a suit, . . . the formal proceeding by which a defendant submits himself to the jurisdiction of the court.'" *Id*. at 5. *B.P.C.* is squarely on point with Appellant's case. Appellant's bail was revoked and he was ordered into custody. Appellant was not ordered to appear back in court. The trial court permitted Appellant to turn himself in to jail a few hours later so that he could drive his mother back home to San Antonio. Therefore, Appellant did not fail to appear as contemplated by the statute.

There is no basis in Texas law for the Court of Appeals's liberal construction of the word "appear" in Section 38.10 of the Penal Code.

The Court of Appeals acknowledged that the word "appear" can be used in a technical sense to mean "coming into court as a party or interested person." *Timmins Opinion, page 7*. This acknowledgement should have ended the analysis for purposes of this case. *Tex. Gov't Code §311.011(b)*.

After acknowledging that "appear" has a technical meaning the Court of Appeals should have limited the scope of its inquiry. The Court, however, then went on to state that the word "appear" may also be defined more broadly as "to come formally before an authoritative body." *Timmins Opinion, page 7*. The Court also looked at the defenses to the bail jumping/failure to appear statute to conclude that the Legislature intended to

use the word "appear" more broadly than contemplated by Appellant based upon references to community supervision, parole, and intermittent sentences. *Timmins Opinion, page 8*. The Court of Appeals construed the word "appear," as set out in the bail jumping/failure to appear statute, to include appearing at places other than court hearings and judicial proceedings. *Timmins Opinion, page 12*.

The Fourth Court's construction, however, runs afoul of Section 311.011 of the Texas Government Code. Section 311.011 of the Government Code deals with the common and technical usage of words. Section 311.011(b) provides that "[w]ords and phrases that have acquired a technical or particular meaning, whether by legislative definition or otherwise, *shall be construed accordingly*." *Tex. Gov't Code §311.011(b)* (emphasis added).

The Court of Appeals acknowledges in its opinion that the word "'[a]ppear' can be used in a technical sense to mean 'coming into court as a party or interested person.'" *Timmins Opinion, page 7*. However, it then goes on to discuss the broader meanings that the word "appear" can have outside of the Penal Code context despite acknowledging that the word has acquired a technical meaning in Texas legal parlance. *Timmins Opinion, pages 8-9*.

Because in Texas legal parlance Bail Jumping and Failure to Appear refers to when a court appearance is missed; there is no case law supporting a broader, more liberal construction of the term "appear." There is, however, some case law pertaining to Chapter 38 of the Penal Code, Obstructing Governmental Operations, which rejects such a construction. In *B.P.C.*, Justice Puryear writing for the Third Court of Appeals rejected bail jumping and failure to appear as a "strange fit." 2004 Tex. App. LEXIS 4729, 2 (Tex. App.—Austin 2004, no pet.).

The Fourth Court reasoned that because the *B.P.C.* case dealt with an escape charge, and Appellant's case is for bail jumping/failure to appear, any commentary by the Third Court of Appeals regarding the technical meaning acquired by the word "appear" is dicta. *Timmins Opinion, page 4.* However, this analysis ignores that B.P.C. *was arguing that he should have been charged with failure to appear* rather than escape and that the Third Court explained why bail jumping/failure to appear was not the proper charge in light of the facts. *In re B.P.C.*, 2004 Tex. App. LEXIS 4729, 3 (Tex. App.—Austin 2004, no pet.).

Appellant also respectfully disagrees that the Third Court's statements regarding the technical meaning of the word "appear" are dicta. These statements by the Third Court are a reflection of Texas jurisprudence on the

technical meaning that the word "appear" has acquired in the context of the bail jumping/failure to appear statute. *In re B.P.C.*, 2004 Tex. App. LEXIS 4729, 5 (Tex. App.—Austin 2004, no pet.).. The Third Court's statements are supported by years of Texas case authority applying the bail jumping/failure to appear statute in cases only dealing with failure to appear for a court proceeding. *See, e.g., Bailey v. State*, 507 S.W.3d 740, 742 (Tex. Crim. App. 2016)(failure to appear at court setting); *Bailey v. State*, 469 S.W.3d 762, 766 (Tex. App.—Houston [1st Dist.] 2015), *aff'd*, 2016 Tex. Crim. App. LEXIS 1502 (Tex. Crim. App. 2016)(failure to appear for hearing); *State v. Chinedu Godwin Ojiaku*, 424 S.W.3d 633, 635 (Tex. App.—Dallas 2013, pet. ref'd)(failure to appear in trial court as ordered); *Carmichael v. State*, 416 S.W.3d 133, 135 (Tex. App.—Houston [1st Dist.] 2013, no pet.)(failure to appear in court); *Johnson v. State*, 416 S.W.3d 602, 603 (Tex. App.—Houston [14th Dist.] 2013, no pet.)(failure to appear in court); *Deleon v. State*, 411 S.W.3d 515, 516 (Tex. App.—Austin 2011, no pet.)(failure to appear at arraignment); *Kay v. State*, 340 S.W.3d 470, 470 (Tex. App.—Texarkana 2011, no pet.)(failure to appear at trial); *Reese v. State*, 305 S.W.3d 882, 883 (Tex. App.—Texarkana 2010, no pet.)(failure to appear at trial); *Walker v. State*, 291 S.W.3d 114, 116 (Tex. App.—Texarkana 2009, no pet.)(failure to appear at arraignment); *Winchester v.*

State, 246 S.W.3d 386, 387 (Tex. App.—Amarillo 2008, pet. ref'd)(failure to appear at arraignment). The Court of Appeals concludes, and Appellant agrees, that the bail jumping/failure to appear statute's apparent purpose is to ensure the defendant will be physically present at trial. *Timmins Opinion, page 11*.

The Court of Appeals also made reference to Chapter 17 of the Code of Criminal Procedure (dealing with bail conditions) in support of the proposition that the word "appear" in the context of pre-trial release may require a defendant's appearance at places other than court. *Timmins Opinion, page 8*. The Fourth Court's reliance on these statutes is misplaced; in this case, Appellant's bail was revoked.

The Court of Appeals addressed the case authority cited by Appellant in his brief that the bail jumping/failure to appear statute has only been applied in cases where a defendant has failed to appear in court. The Court of Appeals held that these cases merely show that failure to appear in court is only one manner of committing the offense of bail jumping/failure to appear, but that it is not necessarily the only way one could commit the offense. *Timmins Opinion, page 4*. This conclusion is flawed because it rests upon the premise that the bail jumping/failure to appear statute may be applied to scenarios other than failing to appear in court with no precedential

authority to support this premise. Appellant's position, however, is supported by a line of intermediate appellate court cases applying the bail jumping/failure to appear statute only when a criminal defendant fails to appear in court in accordance with the terms of his release.

Azeez, Extra-Textual Factors and Pandora's Box

The Court of Appeals notes that the Transportation Code contains a failure to appear statute (Violation of Promise to Appear) and concludes that because the Transportation Code contains the word "court" in the body of the statute, and Section 38.10 of the Penal Code does not, it should be inferred that the Legislature intended a broader meaning for a defendant charged under 38.10. *Timmins Opinion, page 12*. This analysis is flawed because the Court of Criminal Appeals has previously held that the Transportation Code's non-appearance statute is *in pari materia* with Section 38.10 because they cover the same subject matter, ensuring a criminal defendant's appearance in court. *Azeez v. State*, 248 S.W.3d 182, 191-93 (Tex. Crim. App. 2008).

Generally, *Azeez* stands for the proposition that Violation of Promise to Appear (Section 543.009 of the Transportation Code) is narrower in scope and in punishment than Section 38.10 of the Penal Code. *Id*. at 193. Although the legal issues are different, *Azeez* takes a more conservative tact

to the application of Section 38.10 which is consistent with Appellant's argument. It is significant that the Court of Criminal Appeals found the Transportation Code statute to be *in pari materia* with the Penal Code statute. This is an acknowledgement that the statutes cover the same subject and the same conduct. The *in pari materia* rule proceeds on the same supposition that several statutes relating to one subject are governed by one spirit and policy, and are to be consistent and harmonious in their several parts and provisions. *Azeez*, 248 S.W.3d at 192. In the *Azeez* case, the only distinction drawn by the Court of Criminal Appeals between Section 543.009, Transportation Code and Section 38.10, Penal Code was the penalty range. *Id*. at 193. The *Azeez* Court held that someone charged with bail jumping/failure to appear stemming from a speeding violation may only be charged with violation of promise to appear because the Legislature set a lower maximum penalty for that offense, separate from Section 38.10's penalty for similar Class C violations. *Id*. If the Fourth Court's interpretation of Section 38.10 is correct, and 38.10 covers conduct other than just a defendant's failure to appear in court, it is unclear how these two statutes could be *in pari materia*.

Section 38.10 of the Penal Code is of major importance to government operation and administration of justice in Texas. In terms of substantive

criminal law, bail jumping/failure to appear is one of the few offenses prosecuted in all Texas criminal trial courts. Most charges for a violation of Section 38.10 arise from misdemeanor cases (the majority of these cases are in justice and municipal court). Accepting the Fourth Court's suggestion that the word "appear" can also include other locations besides court for a judicial proceeding sets the stage for a new breed of Section 38.10 cases, a potential judicial free for all that could have a cascading effect in district, county, justice, and municipal courts.

In some criminal cases, for instance, criminal defendants are often assigned community service in lieu of fines and without community supervision. If the judge orders an indigent defendant to report on a certain date and time to perform such community service, and the defendant fails to report as ordered, then the Fourth Court's interpretation would permit the defendant to be charged with failure to appear under 38.10 of the Penal Code.

This hypothetical illustrates an unusual application of the bail jumping/failure to appear statute being applied in accordance with the Fourth Court's interpretation. This runs contrary to this Court's ruling in *Azeez* and the technical meaning of the word "appear" as has been commonly used in Texas jurisprudence.

The Fourth Court's interpretation of Section 38.10 of the Penal Code becomes a veritable "Pandora's Box" that permits an elastic application of the statute and the potential for "judge-made" law. These considerations should be part of any interpretation of this statute because the Fourth Court's interpretation broadening the scope of the bail jumping/failure to appear statute could have far-reaching unintended consequences.

Burdens imposed by the Court of Appeals's Interpretation

The Court of Appeals holds that Appellant's construction of the bail jumping/failure to appear statute would impose an unnecessary burden on a trial court when, in the interest of justice, the court grants the defendant some clemency to handle personal matters before being confined pending trial or another bond hearing. *Timmins Opinion, page 12*. This, however, is not the case. The defendant is in custody the moment bail is revoked and the defendant is remanded to jail. If a trial court permits a defendant to handle personal matters before reporting to jail and the defendant absconds, the defendant has escaped from custody.

Conversely, if the Court of Criminal Appeals adopts the Fourth Court's interpretation expanding the scope of the bail jumping/failure to appear statute, the Court would need to develop a line of case authority to delineate which appearances are rationally related to furthering the statutory

purpose of ensuring a defendant's appearance at trial (e.g., failure to appear to perform community service as ordered to pay for fines; failure to report to the clerk's window of the J.P.'s office as ordered to pay fines).

To accept the Fourth Court's interpretation would require this Court to reject or ignore Texas criminal law treatises stating that the bail jumping/failure to appear statute applies when a defendant misses a court date[1]; to reject or ignore the technical meaning of the word "appear" in the context of bail jumping/failure to appear cases; to reject or ignore the *B.P.C.* case (which contains references to these treatises and definitions) holding that a bail jumping/failure to appear offense is committed when a person fails to appear for one's court date; to reject or ignore the line of cases that have applied the bail jumping/failure to appear statute only to cases where a defendant failed to appear in court; and to reject or ignore the realistic consequences of such interpretation.

The "Escape vs. Failure to Appear" Dichotomy

The Court of Appeals determined that it is immaterial whether Appellant's conduct constituted an "escape" under the Texas Penal Code. *Timmins Opinion, page 6*. The Court observed that "[a] defendant's singular

[1] *See, e.g.,* Ed Kinkeade & S. Michael McColloch, Texas Penal Code Annotated 398 (1999-2000 ed.) (commentary to section 38.10) (bail jumping "offense occurs when a court appearance is missed").

act or course of action may constitute multiple offenses. If a prosecutor has probable cause to believe the defendant committed an offense defined by statute, the prosecutor's decision of what charges, if any, to file generally rests entirely within the prosecutor's discretion." *Timmins Opinion, page 6*. While these are true statements, these statements reflect an apparent misunderstanding of the reason why Appellant pointed out in his brief that Appellant could only be charged with the offense of escape.

If Appellant's bail was revoked and he was remanded to jail, but the trial court ordered him to report to jail after driving his mother home, *was Appellant under restraint pursuant to a court order?* The answer is clearly yes. Appellant was not free to go wherever he wanted. For purposes of the statute, "custody" means "under arrest by a peace officer or *under restraint by a public servant* pursuant to an order of a court of this state or another state of the United States." *Tex. Penal Code §38.01(1)(A)* (emphasis added). Appellant was under restraint pursuant to a court order and in custody as that term is defined in the Penal Code. There is no other reasonable interpretation of these facts.

Under the facts of this case, the offenses of escape and bail jumping/failure to appear are mutually exclusive. In order to be guilty of an escape, the State must prove that a defendant was *placed* in custody, and that

the defendant later escaped. *Tex. Penal Code §38.06(a)(2)*. In order to be guilty of bail jumping/failure to appear, the State must prove that a defendant was *released* from custody, and subsequently failed to appear in court in accordance with the terms of the defendant's release. *Tex. Penal Code §38.10(a)*. Contrary to the Fourth Court's suggestion, in light of the facts of this case, Appellant could not have theoretically been guilty of *both* escape and bail jumping/failure to appear. Either Appellant was in custody or he was not. The point of illustrating this distinction is to show that there was an appropriate remedy for Appellant's malfeasance in this case, which is an escape charge. In other words, there is no void in the law that Appellant could have fallen into that would have made his conduct without reproach.

Conclusion

The Court of Criminal Appeals should reverse the Fourth Court's judgment. At the moment the trial court revoked Appellant's bail, Appellant was in custody as that term is defined in the Texas Penal Code. Appellant remained in the custody of the trial court because he remained under restraint pursuant to the trial court's order. Because he remained in custody, he could not be convicted of bail jumping/failure to appear.

Further, the Fourth Court's liberal interpretation of the bail jumping/failure to appear statute is not supported by Texas jurisprudence and runs afoul of the Code Construction Act. By holding that the word "appear," in the context of bail jumping/failure to appear cases, may also include locations other than court or judicial proceedings, the scope of the bail jumping/failure to appear statute is significantly broadened beyond the technical meaning that the word "appear" has acquired in Texas legal parlance. Adopting this interpretation may very well open "Pandora's Box" and lead to a new breed of bail jumping/failure to appear cases that we have not seen before, nor contemplated, in Texas jurisprudence.

PRAYER FOR RELIEF

WHEREFORE, PREMISES CONSIDERED, Appellant respectfully prays that this Honorable Court sustain the appellate contentions herein, reverse the judgment of the Fourth Court of Appeals, and render a judgment of acquittal.

Respectfully submitted,

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ATTORNEYS FOR APPELLANT, TROY ALLEN TIMMINS

CERTIFICATE OF SERVICE

This is to certify that on January 7, 2019, a true and correct copy of the above and foregoing document was served on Hon. Scott Monroe, 402 Clearwater Paseo, Kerrville, Texas 78028 via electronic transmission at *scottm@198da.com*; on Hon. David A. Schulman, 1801 East 51st Street, Suite 365-474, Austin, Texas 78723 via electronic transmission at *zdrdavida@davidschulman.com*; and that I have mailed a true and correct copy of the above and foregoing document to the State's Prosecuting Attorney, P.O. Box 13046, Austin, Texas 78711.

/s/ M. Patrick Maguire
M. Patrick Maguire

APPENDIX
Fourth Court of Appeals' opinion of July 18, 2018

Fourth Court of Appeals
San Antonio, Texas

OPINION

No. 04-17-00187-CR

Troy Allen **TIMMINS**,
Appellant

v.

The **STATE** of Texas,
Appellee

From the 198th Judicial District Court, Bandera County, Texas
Trial Court No. CR16-153
Honorable M. Rex Emerson, Judge Presiding

Opinion by: Luz Elena D. Chapa, Justice

Sitting: Patricia O. Alvarez, Justice
Luz Elena D. Chapa, Justice
Irene Rios, Justice

Delivered and Filed: July 18, 2018

AFFIRMED AS MODIFIED

The trial court revoked appellant's bail bond, allowed him to leave the courtroom, and ordered him to report later to the county jail, which he failed to do. Has the appellant committed an offense under section 38.10 of the Texas Penal Code, "Bail Jumping and Failure to Appear"? Deciding issues of first impression, we conclude he has; he was "released" from custody, and he subsequently failed to "appear" in accordance with the terms of his release. But, because the trial court erred by assessing attorney's fees, we modify the judgment to delete the assessment of attorney's fees and affirm the judgment as modified.

BACKGROUND

After being involved in a car accident, appellant Troy Allen Timmins was indicted in Bandera County for manslaughter and criminally negligent homicide. He was arrested and subsequently released from confinement on bail. The State moved to revoke Timmins's bail, alleging he had used drugs in violation of the conditions of his bail bond. The trial court set a hearing on the State's motion. Because Timmins could not drive and, believed he would not be taken into custody, Timmins had his elderly mother drive him from San Antonio to Bandera County for the hearing.

At the hearing, the trial court revoked Timmins's bond, but allowed Timmins to accompany his mother on her return to San Antonio. The trial court ordered Timmins to report to the Bandera County jail by 3:00 p.m. later that same day. Timmins accompanied his mother to San Antonio, but did not subsequently report to the Bandera County jail as ordered. Timmins was thereafter indicted, convicted by a jury, and sentenced for failing to appear under Texas Penal Code section 38.10. TEX. PENAL CODE ANN. § 38.10 (West 2016). Although the trial court found Timmins was indigent, the trial court assessed attorney's fees. Timmins filed a timely notice of appeal.

PENAL CODE SECTION 38.10, "BAIL JUMPING AND FAILURE TO APPEAR"

Section 38.10 of the Texas Penal Code generally provides that "[a] person lawfully released from custody, with or without bail, on condition that he subsequently appear commits an offense if he intentionally or knowingly fails to appear in accordance with the terms of his release." *Id.* § 38.10(a). In two legal sufficiency issues, Timmins argues his failure to report to the county jail was not an offense under section 38.10 because he was never "released" from custody and he did not fail to "appear," which he contends is a technical term meaning one's physical presence in court for a judicial proceeding.

A. Standard of Review

In reviewing the legal sufficiency of the evidence, we must determine whether "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Villa v. State*, 514 S.W.3d 227, 232 (Tex. Crim. App. 2017) (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). We view all of the evidence in the light most favorable to the verdict. *Id.* We must defer to the jury's responsibility to fairly resolve conflicts in testimony, weigh the evidence, and draw reasonable inferences. *Id.*

B. Statutory Construction

To conduct a legal sufficiency review, we examine the statutory requirements necessary to uphold the conviction or finding. *Prichard v. State*, 533 S.W.3d 315, 319 (Tex. Crim. App. 2017). "We determine the meaning of statutes *de novo*." *Id.* When construing statutes, "we seek to effectuate the collective intent or purpose of the legislators who enacted the legislation." *Boykin v. State*, 818 S.W.2d 782, 785 (Tex. Crim. App. 1991). We focus our analysis on the literal text of the statute and "attempt to discern the fair, objective meaning of that text at the time of its enactment." *Id.* We apply the plain meaning of a term if the statute is clear and unambiguous. *Id.*

We may consult standard dictionaries to determine an undefined term's plain meaning. *Prichard*, 533 S.W.3d at 319-20. However, "[i]f a word or a phrase has acquired a technical or particular meaning, we construe the word or phrase accordingly." *Liverman v. State*, 470 S.W.3d 831, 836 (Tex. Crim. App. 2015). "When interpreting a statute, we look not only at the single, discrete provision at issue but at other provisions within the whole statutory scheme." *State v. Schunior*, 506 S.W.3d 29, 37 (Tex. Crim. App. 2016).

C. The Parties' Arguments and Authorities

Timmins's challenges to the legal sufficiency of the evidence raise issues of first impression. They require us to construe the terms "release" and "appear," as they are used in

section 38.10. Timmins relies on *In re B.P.C.*, a case in which a juvenile challenged his adjudication for having engaged in the delinquent conduct of "escape" under section 38.06 of the Texas Penal Code. *See* No. 03-03-00057-CV, 2004 WL 1171670 (Tex. App.—Austin May 27, 2014, no. pet.) (mem. op.). In *In re B.P.C.*, the juvenile's disposition required him to report to a detention facility. *Id.* at *1. The trial court released the juvenile to retrieve some of his belongings and ordered him to report back to the detention facility, but the juvenile absconded. *Id.* The court in *In re B.P.C.* opined that prosecution under section 38.10 would have been a "strange fit" because the juvenile "was not released and ordered to appear at a later proceeding as envisioned by the failure to appear/bail jumping statute." *Id.* The court cited to cases and definitions suggesting "appear" means being physically present in court for a judicial proceeding. *See id.* Because the *In re B.P.C.* court addressed a charge of "escape" under section 38.06, we consider the court's remarks about section 38.10 to be dicta.

Timmins likewise cites to dictionary definitions suggesting "appear" means being physically present in court for a judicial proceeding, and he cites to cases in which appellate courts have affirmed defendants' convictions for failing to appear when the defendants were not physically present in court for a judicial proceeding. The cases cited by Timmins support only the proposition that a failure to appear under section 38.10 includes failing to be physically present in court for a judicial proceeding; not that section 38.10 excludes failing to report to jail under the circumstances similar to those in this case. Conversely, the State has cited no case involving a defendant's conviction under section 38.10 when the defendant failed to report to jail under circumstances similar to those in this case. In the absence of any authority on point, we address the issues of first impression by applying the general guiding rules and principles of construing statutes and reviewing the sufficiency of the evidence.

D. "Release" from Custody

Timmins argues he was never "released" from custody.[1] "Release" is not statutorily defined for purposes of section 38.10, but its plain meaning in this context is "[t]he action of freeing or the fact of being freed from restraint or confinement." *See* BLACK'S LAW DICTIONARY 1316 (8th ed. 2004). "Custody" includes being "under restraint by a public servant pursuant to an order of a court of this state." TEX. PENAL CODE ANN. § 38.01(1)(A) (West 2016). The statutory definition of "custody" includes the word "restraint," as does the dictionary definition of "release." Although "restraint" is not statutorily defined, its plain meaning in this context is "[c]onfinement, abridgement, or limitation," or "[p]rohibition of action; holding back." *See* BLACK'S LAW DICTIONARY, *supra*, at 1340. Thus, a person may be "released" from custody under section 38.10 when the person is freed from a prohibition or limitation on one's action.

The evidence at trial showed the conditions of Timmins's bail required him to be physically present for all hearings in the underlying case. Consequently, during the hearing on the State's motion to revoke, Timmins's physical presence in the courtroom was required and he was prohibited from leaving the courtroom. When the trial court revoked Timmins's bail, Timmins remained under a prohibition against leaving the courtroom. It was only when the trial court allowed Timmins to accompany his mother on her return to San Antonio that Timmins was freed from the prohibition against leaving the courtroom and freed from the limitation of being physically present in the courtroom. Giving "release" in section 38.10 its plain meaning, we hold that under these circumstances, a jury rationally could have found Timmins was "released" from custody. *See* TEX. PENAL CODE ANN. §§ 38.01(1)(a), 38.10(a). We therefore overrule Timmins's

[1] Timmins does not challenge the "custody" element of the offense. Instead, he argues, "An elected judge falls within the Penal Code definition of 'public servant.' . . . Appellant was under restraint by a public servant pursuant to an order of a court of this state. Hence, Appellant was in custody."

challenge to the "release" element of the offense, and turn to addressing whether Timmins's failure to report to the county jail as ordered was a failure to "appear."

E. Failure to "Appear"

Timmins argues his failure to report to the county jail was not a failure to "appear" because being physically present at a county jail is not an "appearance" under section 38.10. Timmins contends the term "appear" in section 38.10 has acquired a technical meaning of being physically present in court for a judicial proceeding. He further contends a failure to report to jail under the circumstances presented in this case is an "escape" under section 38.06, not a "failure to appear." The State counters that "appear" should be construed as "showing up" anywhere required by the terms of a defendant's release from custody.

1. "Failure to Appear" vs. "Escape"

Whether Timmins's conduct constituted an "escape" under section 38.06 is immaterial to whether Timmins's conduct constituted a "failure to appear" under section 38.10. A defendant's singular act or course of action may constitute multiple offenses. *See Vick v. State*, 991 S.W.2d 830, 833 (Tex. Crim. App. 1999). If a prosecutor has probable cause to believe the defendant committed an offense defined by statute, the prosecutor's decision of what charges, if any, to file generally rests entirely within the prosecutor's discretion. *Neal v. State*, 150 S.W.3d 169, 173 (Tex. Crim. App. 2004) (citing *Bordenkircher v. Hays*, 434 U.S. 357, 364 (1978)). Timmins does not contend, and we do not conclude, that the State's construction would render any part of section 38.06 meaningless. We therefore need to consider only whether Timmins's failure to report to the county jail was a failure to "appear," as that term is used in section 38.10.

2. The Plain Meaning of "Appear" in Section 38.10

Section 38.10 provides:

> Sec. 38.10. BAIL JUMPING AND FAILURE TO APPEAR. (a) A person lawfully released from custody, with or without bail, on condition that he subsequently appear commits an offense if he intentionally or knowingly fails to appear in accordance with the terms of his release.
>
> (b) It is a defense to prosecution under this section that the appearance was incident to community supervision, parole, or an intermittent sentence.
>
> (c) It is a defense to prosecution under this section that the actor had a reasonable excuse for his failure to appear in accordance with the terms of his release.
>
> (d) Except as provided in Subsections (e) and (f), an offense under this section is a Class A misdemeanor.
>
> (e) An offense under this section is a Class C misdemeanor if the offense for which the actor's appearance was required is punishable by fine only.
>
> (f) An offense under this section is a felony of the third degree if the offense for which the actor's appearance was required is classified as a felony.

The term "appear" is not statutorily defined for purposes of section 38.10. "Appear" can be used in a technical sense to mean "coming into court as a party or interested person." *See* BLACK'S LAW DICTIONARY, *supra*, at 107. Technically, "appear" may also be defined more broadly as "to come formally before an authoritative body." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 102 (Philip Babcock Gove et al. eds., 1981). However, the plain meaning of "appear" is broader and includes "to come into view" or, as the State defines the term, "to show up" somewhere. *See id.*

Section 38.10 is the only provision in chapter 38 that contains the term "appear." *See* TEX. PENAL CODE ANN. §§ 38.01-38.19. Subsection (a) contemplates that someone who fails to "appear" will have been lawfully released from restraint or confinement, with or without bail, on condition that he subsequently be physically present at some place and time. *Id.* § 38.10(a). Generally, subsection (a) applies to a defendant who is charged and arrested for an offense, placed in jail, and then released from confinement pending trial on the charged offense. *See id.*; *see, e.g.*, *Bailey v. State*, 507 S.W.3d 740, 742 (Tex. Crim. App. 2016). Court-imposed conditions of a defendant's pre-trial release from confinement will require the defendant to be physically present

for trial. *See* TEX. CODE CRIM. PROC. ANN. art. 17.01 (West 2015). However, the conditions of the defendant's pre-trial release may also require the defendant to be physically present at places other than in court, such as a residence as part of a home curfew or a facility for drug or alcohol testing, treatment, or education. *See id.* arts. 17.03(c), 17.43(a), 17.44(a)(1)-(2) (West 2015 & Supp. 2017). We find nothing in subsection (a) other than the word "appear" that supports either side's construction. *See* TEX. PENAL CODE ANN. § 38.10(a). Similarly, we find nothing in subsections (c) through (f) that would support either side's construction. *Id.* § 38.10(c)-(f).

As used in subsection (b), however, the term "appearance" suggests the Legislature used the word "appear" more broadly than Timmins proposes. *See id.* § 38.10(b). Subsection (b) provides a defense to prosecution if the "appearance was incident to community supervision, parole, or an intermittent sentence." *Id.* Conditions of community supervision, parole, and intermittent sentences generally require a defendant to be physically present at places other than in court for a judicial proceeding. *See, e.g.*, TEX. CODE CRIM. PROC. ANN. art. 42A.301(b)(4) (West 2018) (providing reporting to supervision officer may be a condition of community supervision); TEX. GOV'T CODE ANN. § 508.221 (West Supp. 2017) (providing reporting to supervision officer may be a condition of parole) (citing article 42A); TEX. CODE CRIM. PROC. ANN. art. 42.033(a)-(e) (West 2018) (providing intermittent sentences that require going to and from a place of confinement). A defendant's physical presence may be required in court for a judicial proceeding when a defendant violates conditions of his community supervision. *See, e.g.*, arts. 42A.108, 42A.751(a)-(c) (West Supp. 2017). It is also unsettled whether a court hearing is necessary when a trial court revokes an intermittent sentence. *See Guzman v. State*, 841 S.W.2d 61, 67 (Tex. App.—El Paso 1992, pet. ref'd); *see also id.* (Osborn, C.J., concurring and dissenting) (agreeing with majority that a trial court retains jurisdiction to modify conditions of an intermittent sentence, but disagreeing that the trial court may do so without a hearing). But when a defendant violates a

condition of parole, a judicial proceeding is not required because parole revocation involves an administrative hearing before the board of pardons and paroles. *See* TEX. GOV'T CODE ANN. §§ 508.251, 508.281 (West Supp. 2017).

Thus, community supervision, parole, and intermittent sentences generally do not involve a defendant's physical presence for an official court proceeding. However, if a defendant violates a condition of community supervision, parole, or an intermittent sentence, the defendant may be required to appear for an official proceeding. If a parolee violates a parole condition, there is no official proceeding in court because parole-revocation hearings are administrative hearings. *See id.* While we cannot agree that the legislature used the word "appear" in subsection (a) as meaning ***only*** "coming into court as a party or interested person," *see* BLACK'S LAW DICTIONARY, *supra*, at 107, subsection (b) does not necessarily require construing "appear" more broadly than "com[ing] formally before an authoritative body." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY, *supra*, at 102. Having considered section 38.10 as a whole, and in light of the statutory scheme in chapter 38, we conclude there is no textual basis for either party's construction that would include or exclude the facts of the present case.

3. Extra-Textual Factors

Finding no additional support for either party's construction from the textual provisions of section 38.10 or chapter 38 as a whole, we turn to consider legislatively provided, extra-textual considerations, such as the object the statute seeks to attain, other statutes on the same subject, and the consequences of a construction, to determine the Legislature's intent. *See* TEX. GOV'T CODE ANN. § 311.023 (West 2013) (providing other factors for consideration "whether or not the statute is considered ambiguous on its face"); *Prichard*, 533 S.W.3d at 327. Before turning to those factors, we note "[t]he rule that a penal statute is to be strictly construed does not apply to [the Penal Code]. The provisions of this code shall be construed according to the fair import of their

terms, to promote justice and effect the objectives of the code." TEX. PENAL CODE ANN. § 1.05 (West Supp. 2017); *see State v. Johnson*, 198 S.W.3d 795, 796 (Tex. App.—San Antonio 2006) (stating the common-law rule of lenity for construing penal provisions does not apply to the Texas Penal Code), *aff'd*, 219 S.W.3d 386 (Tex. Crim. App. 2007). We begin with the purposes of the statute.

a. Purposes of Section 38.10

The parties have cited no authority, and we have found none, explaining the purposes of Texas's bail-jumping and failure to appear statute. But section 38.10's various provisions make it apparent that section 38.10's principal purpose is to ensure the defendant is physically present for trial on a pending criminal charge. A criminal case generally cannot proceed to trial unless the defendant is physically present. *See* TEX. CODE CRIM. PROC. ANN. art. 33.03 (West 2006); *Illinois v. Allen*, 397 U.S. 337, 338 (1970). Texas law generally provides two methods of ensuring the defendant is physically present for trial: (1) confining the defendant until trial; or (2) if the defendant is released from confinement before trial, ordering the defendant to be physically present for trial. *See generally* TEX. CODE CRIM. PROC. ANN. arts. 17.01-17.49. The Texas Legislature has provided for bail forfeiture, which incentivizes the defendant to be physically present for trial on a pending criminal charge. *See* TEX. CODE CRIM. PROC. ANN. arts. 22.01-22.18 (West 2009).

By providing an offense for not being physically present at trial on a pending criminal charge, section 38.10(a) further helps to ensure the underlying criminal case may proceed to trial and to an adjudication of the charged offense. *See* TEX. PENAL CODE ANN. § 38.10(a). Conversely, subsection (b) provides defenses to prosecution when there are no criminal charges pending: when adjudication of the charges have been deferred (pre-trial community supervision), and when the charges have been adjudicated (post-conviction community supervision, parole, and intermittent sentences). *Id.* § 38.10(b). The apparent purpose is also reflected by subsections (d) through (f),

the offense classification provisions, which refer to the "offense for which the actor's appearance was required." *Id.* § 38.10(d)-(f). Thus, section 38.10's apparent purpose is to ensure the defendant will be physically present at trial.

When, as here, the defendant is released from confinement before trial on bail, and the trial court revokes the bail, the only options are to confine the defendant until trial or to conduct another bond hearing. However, circumstances, such as those in this case or those in *In re B.P.C.*, may arise when a trial court may exercise its discretion to grant the defendant some clemency before having the defendant confined again. *See* 2004 WL 1171670, at *1. In such circumstances, the purpose of the trial court ordering the defendant to report to jail comports with the purpose of section 38.10: ensuring the defendant is accounted for so that the criminal case may proceed to trial on the pending criminal charge. Construing "appear" as including the facts of the present case would therefore be consistent with section 38.10's apparent purpose, whereas Timmins's narrow construction would seem to undermine section 38.10's apparent purpose. We conclude this extra-textual consideration weighs against Timmins's construction. *See* TEX. GOV'T CODE ANN. § 311.023(1); *Prichard*, 533 S.W.3d at 327.

b. Other Statutes on the Same Subject

We next consider provisions of other statutes on the subject of bail and failures to appear. *See* TEX. GOV'T CODE ANN. § 311.023(4). The Texas Transportation Code provides a similar "failure to appear" offense in section 543.009. TEX. TRANSP. CODE ANN. 543.009 (West 2011). Section 543.009 provides:

> (a) A person may comply with a written promise to appear in court by an appearance by counsel.
>
> (b) A person who wilfully violates a written promise to appear in court, given as provided by this subchapter, commits a misdemeanor regardless of the disposition of the charge on which the person was arrested.

Id. In section 543.009 of the Transportation Code, unlike section 38.10 of the Penal Code, the Legislature clarified "appear" with the words "in court." *See id.*; *see also id.* §§ 543.003, 543.004(a)(2), 543.005. If the Legislature intended the term "appear" in this context to mean only a court appearance, then the phrase "in court" in section 543.009 would be superfluous. *See Azeez v. State*, 248 S.W.3d 182, 191-93 (Tex. Crim. App. 2008) (holding these two "failure to appear" offenses are *in pari materia* and must be construed "as though they were parts of one and the same law"). Other statutes on the same subject suggest the Legislature did not intend the word "appear," as used in statutes relating to bail and failures to appear, to be limited only to being physically present in court. *See* TEX. GOV'T CODE ANN. § 311.023(4); *Prichard*, 533 S.W.3d at 327.[2] We conclude this extra-textual consideration also weighs against Timmins's construction.

c. Consequences of Timmins's Construction

Adopting Timmins's construction would also impose an unnecessary burden on a trial court when, in the interest of justice, the court grants the defendant some clemency to handle personal matters before being confined pending trial or another bond hearing. It would make little sense that, to further the purpose of section 38.10, a trial court would have to set a hearing; condition the defendant's release on returning to the courtroom for that hearing; open the case; order the defendant to be arrested by the sheriff's deputies; and then have the sheriff or sheriff's deputies transport the defendant to jail. When the defendant can report directly to jail, "[i]t would make little sense to require [the defendant] to appear in the courtroom personally before the judge simply to be transported to the jail." *See State v. Jackson*, 488 N.W.2d 701, 705 (Iowa 1992). We

[2] Many other statutory provisions relating to bond revocations and failures to appear also qualify the term "appear" as either before a court or judge; as required by a court order; in response to a summons; in accordance with the Code of Criminal Procedure; or according to bond conditions. *See* TEX. CODE CRIM. PROC. ANN. arts. 15.17, 17.08, 17.49, 22.01, 22.13, 22.18, 23.03, 45.016, 45.044 53.13.

conclude this extra-textual consideration weighs against Timmins's construction. *See* TEX. GOV'T CODE ANN. § 311.023(5); *Prichard*, 533 S.W.3d at 327.

d. Our Construction of the Term "Appear" in Section 38.10

Having considered the provisions of section 38.10, chapter 38 as a whole, and legislatively provided extra-textual considerations, we conclude the Legislature intended courts to construe the term "appear" with reference to the terms of the particular terms of the defendant's release from custody. *See* TEX. PENAL CODE ANN. § 38.10(a) (providing a failure to appear is an offense only if the defendant "fails to appear in accordance with the terms of his release"). Our construction includes an "appearance" in the technical legal sense. *See, e.g.*, *Bailey*, 507 S.W.3d at 742 (failure to be physically present in court for a judicial proceeding); *Azeez*, 248 S.W.3d at 185 & n.5, 189-93 (suggesting responding to a charged traffic offense would satisfy terms of release from arrest during a traffic stop). But we construe the term "appear" in section 38.10 as including places, other than a courtroom, where a defendant may be required to report or be physically present as required by the conditions of the defendant's release from custody.

4. Application of the Law to the Evidence Admitted at Trial

The evidence admitted at Timmins's trial shows Timmins had criminal charges pending, Timmins was released on bail, and the trial court revoked Timmins's bail. The evidence further shows the trial court released Timmins from the courtroom and imposed a condition on Timmins's release. The terms of Timmins's release required him to report to and be physically present at the county jail by 3:00 p.m. later that day to await trial. The evidence also shows Timmins failed to report to and be physically present at the county jail as required by the terms of his release. We therefore hold there is legally sufficient evidence that Timmins failed to appear in accordance with the terms of his release. *See* TEX. PENAL CODE ANN. § 38.10(a).

ATTORNEY'S FEES

Timmins argues the evidence is insufficient to support the assessment of attorney's fees because his presumed indigence was never rebutted. In its brief, the State agrees, acknowledging Timmins is entitled to have the judgment reformed because the presumption of indigence was never rebutted. The record shows the trial court determined Timmins was indigent, and did not make a finding that Timmins was able to repay any amount of the costs of court-appointed legal counsel. In such circumstances, the proper remedy is to delete the assessment of attorney's fees from the judgment. *See Cates v. State*, 402 S.W.3d 250, 251-52 (Tex. Crim. App. 2013).

CONCLUSION

There is legally sufficient evidence that Timmins was "released" from custody and failed to "appear" as contemplated by section 38.10(a). The facts of this case do not present a paradigmatic example of a failure to appear, and therefore may seem to be a "strange fit." *See In re B.P.C.*, 2004 WL 1171670 at *1. Nevertheless, considering the text and purpose of section 38.10, chapter 38 as a whole, other statutes on similar subjects, and the consequences of Timmins's constructions, we conclude the facts of this case fit within the fair, objective meaning of section 38.10. But because the trial court erred by assessing attorney's fees, we modify the judgment to delete the assessment of attorney's fees and affirm the judgment as modified. *See Cates*, 402 S.W.3d at 251-52; *see also* TEX. R. APP. P. 43.2(b) (permitting our judgment on appeal to modify the trial court's judgment and affirm the judgment as modified).

Luz Elena D. Chapa, Justice

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